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9-12-1996

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"Rehkop v. Berwick Healthcare" (1996). *1996 Decisions*. 70.
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7600

ROBERT A. REHKOP,

Appellant

v.

BERWICK HEALTHCARE CORPORATION; BERWICK HOSPITAL
CENTER; WYOMING VALLEY HEALTH CARE SYSTEM, INC.; ALEX
KERIS; DAVID KASPUTIS; HENRY MANDEL; DAVID MATISSE;
THOMAS SPATT; THE BOARD OF DIRECTORS OF THE BERWICK
HEALTHCARE CORPORATION

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-00668)

Argued

June 4, 1996

Before: BECKER and MANSMANN, Circuit Judges,
and BROTMAN, District Judge.*

(Filed September 12, 1996)

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* Honorable Stanley S. Brotman of the United States
District Court for the District of New Jersey, sitting by
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OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this civil RICO complaint, Robert A. Rehkop alleged that he was discharged from his position as a Certified Registered Nurse Anesthetist in retaliation for refusing to complete what he contends were fraudulent Medicare, Medicaid, and Medical Assistance forms and for reporting this activity to the FBI. The district court dismissed the complaint, holding that Rehkop did not suffer an injury "substantially caused" by the RICO enterprise pursuant to 18 U.S.C. § 1962(c). The court further dismissed the section 1962(d) conspiracy count, after finding Rehkop's claim under section 1962(c) deficient.

We hold that the district court correctly dismissed the section 1962(c) count. Nonetheless, in light of our opinion in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), Rehkop is not precluded from alleging a RICO conspiracy under section 1962(d). Thus we will reverse the district court's dismissal of the conspiracy count and remand also for reinstatement of the pendent state law claims.

I.

In January of 1990, Rehkop was hired as a Certified Registered Nurse Anesthetist by the Berwick Healthcare Corporation to provide services at the Berwick Hospital Center.

Berwick Hospital Center provided anesthesia services to the public, participating in Medicare, Medicaid and Medical Assistance as these programs are established and administered by the United States of America and the Commonwealth of Pennsylvania. An anesthesiologist, David Kasputis, M.D., was hired to provide the anesthesia services; Alex Keris was the Chief Nurse Anesthetist and Manager of the Anesthesia Department. Keris was Rehkop's direct supervisor. For the anesthesia services provided, Keris and Kasputis submitted claims for payment to the federal and state programs and received payment for covered patients.

Rehkop alleges that Keris and Kasputis submitted fraudulent claims and received payment, through the United States Postal Service, to which they were not entitled, subjecting them to civil and criminal penalties under 42 U.S.C. §§ 1320a, 7a and 7b and Pa. Stat. Ann. tit. 62, § 1407 and constituting mail fraud under 18 U.S.C. § 1341.

Rehkop further alleges that he was required to complete claim forms, but when he learned that the claims were fraudulent, he refused to do so. He contends that he reported the activity to Henry Mandel, Vice-President of Human Resources of Berwick Hospital Center. Although Mandel advised Rehkop that he would discuss the matter with Chief Financial Officer David Matisse, Mandel did not contact Rehkop, so Rehkop approached Matisse directly. Matisse allegedly told Rehkop that he had discussed the situation with both Thomas Spatt, Chief Executive Officer of Berwick Hospital Center, and with the Board of Directors of Berwick Healthcare Corporation and was told not to pursue the matter. Rehkop then reported these activities to the Federal Bureau of Investigation.

Rehkop contends that it was after these conversations that he began to receive unfounded and untrue disciplinary actions signed by Keris. He also experienced lengthy delays in the payment of funds due him for his professional services and as reimbursement for expenses. On October 31, 1994, Keris informed Rehkop that he was terminated.

Subsequently, Rehkop filed a complaint in the United States District Court for the Middle District of Pennsylvania alleging that the Berwick Healthcare Corporation, the Berwick Hospital Center, the Wyoming Valley Healthcare System, Inc., Alex Keris, David Kasputis, Henry Mandel, David Matisse, Thomas Spatt, and the Board of Directors of the Berwick Healthcare Corporation conspired to commit and did commit mail fraud (by submitting fraudulent claims for reimbursement) from approximately January, 1990 through at least October 31, 1994. Specifically, Rehkop alleged that in furtherance of the conspiracy, they undertook a plan of activity which led to his termination in order to conceal the conspiracy and to impeach his credibility should he assist

the government in prosecuting them. Rehkop avers that these acts constitute "predicate acts" which violate 18 U.S.C. § 1962(c) and that each of the defendants entered into a conspiracy to commit these acts in violation of 18 U.S.C. § 1962(d).

All of the defendants filed motions to dismiss in which they contended that Rehkop lacked standing to pursue a civil RICO claim against them. By orders dated October 10, 1995, the district court granted these motions and dismissed Rehkop's complaint in its entirety, pursuant to Fed. R. Civ. P. 12(b)(6).

II.

In enacting RICO, Congress declared that
[a]ny person injured in his business or
property by reason of a violation of section
1962 of this chapter may sue therefor in
any appropriate United States district court
. . . .

18 U.S.C. § 1964(c). In order to have standing to pursue a claim under section 1964(c), a plaintiff must first demonstrate that the defendant committed a violation of one or more subsections of section 1962, and second, that the violation was a substantial cause of the injury to his business or property. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d at 1164.

In *Shearin v. E.F. Hutton Group, Inc.*, the plaintiff, like Rehkop, maintained that she was terminated from her job at Hutton Trust in furtherance of a RICO conspiracy and additionally, that the defendants allegedly violated 18 U.S.C. §§ 1962(a), (b), (c) and (d). The starting point for our analysis of *Shearin's* standing under section 1964(c) was the Supreme Court's opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). In *Sedima* the Supreme Court interpreted section 1964(c) as requiring that the injury relied upon by a plaintiff be the result of a section 1962 violation. 473 U.S. at 495. Applying the *Sedima* standard for RICO standing in *Shearin's* civil case, we held that *Shearin* had failed to plead injury resulting from defendant's violation of sections 1962(a) or (c). 885 F.2d at 1167-68. *Shearin* contended that E.F. Hutton caused her injury, first, in hiring her away from her previous job and then in firing her from Hutton when she refused to "play the good soldier." *Id.* at 1168. We concluded that neither job loss could be said to have resulted from violations of any of RICO's first three subsections or from the predicate acts necessary to establish them. Rather, "if the Hutton Companies' predicate acts under section 1962(a) or (c) injured anybody, they injured those Hutton customers whom the securities scheme defrauded." *Id.*

Although we held that *Shearin* lacked standing to pursue a civil RICO remedy for racketeering activity pursuant to section 1962(c), we found that she had standing to bring an action for alleged conspiracy in violation of RICO's section 1962(d). We observed that "while the section 1962(a) and (c) violations she alleges injured only customers, that is not so with respect to the alleged section 1962(d) conspiracy." 885 F.2d at 1168.

Shearin's contentions that "Hutton Trust hired her as window dressing to perpetuate the fraud that it was a legitimate company" and her contention that she "was fired to preserve the same fraud when she would not participate" qualified as predicate acts under section 1962(d). *Id.* Accordingly, we held that Shearin's hiring and firing plausibly constituted overt acts that could establish a conspiracy, and "[a]ssuming that the hiring and firing were injuries, those injuries did occur 'by reason of' Huttons' violation of section 1962(d)." 885 F.2d at 1168-69. Thus we concluded that Shearin's allegations stated a claim for relief pursuant to section 1964(c).

III.

In Count I of his complaint, Rehkop alleged that while he was employed as a nurse anesthetist at the Berwick Hospital Center, the defendants conspired to defraud Medicare and Medicaid by filing fraudulent claims for payment using the U.S. Postal Service. Rehkop averred that these acts constituted "predicate acts" which violate 18 U.S.C. § 1962(c), upon which a civil RICO claim may be based pursuant to 18 U.S.C. § 1964(c). A violation of § 1962(c) requires (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity. *Sedima*, 473 U.S. at 495. In addition, the plaintiff only has standing if he has been injured in his business or property by the conduct constituting the violation. *Id.*

Here, in addressing Rehkop's assertion that the defendants violated 18 U.S.C. § 1962(c), the district court concluded that the filing of fraudulent claims with Medicare and Medicaid may constitute a predicate act providing the basis for liability under section 1962(c). See *United States v. Khan*, 53 F.3d 507 (2d Cir. 1995). We agree with this conclusion. We also agree with the court's conclusion that Rehkop's complaint, however, failed to allege that he suffered an injury which was substantially caused by the defendants' alleged violations of section 1962(c). In this regard, the district court observed that the only injury Rehkop alleged was his firing from Berwick Hospital Center. The defendants' alleged racketeering activities, however, did not substantially cause Rehkop to lose his job. Rather, the direct victims of the alleged racketeering were the Medicare and Medicaid programs and the taxpayers. Thus, Rehkop did not have standing to sue the defendants pursuant to section 1964(c) based upon their alleged violations of section 1962(c). *Shearin*, 885 F.2d at 1168.

Rehkop also claimed that the defendants entered into a conspiracy to commit violations of section 1962(c) in violation of 18 U.S.C. section 1962(d) which provides that: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." The district court held that Rehkop lacks standing to pursue a conspiracy claim under section 1962(d) because, in its opinion, such a claim requires that the plaintiff state a viable cause of action under another section of 1962 as well. Insofar as Rehkop could not go forward on his section 1962(c) claim, the court reasoned, his section 1962(d) claim also failed.

The district court's decision was influenced by *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), which it viewed as superseding *Shearin*. The court, however, misconstrued our holding in *Lightning Lube*. There we held that in order to state a violation of section 1962(d) for conspiracy to violate subsection (a), (b), or (c), the plaintiff must establish that the defendants violated (or were going to violate) one of those subsections. The problem in *Lightning Lube* was that the actions alleged to constitute violations of subsections 1962(a), (b), and (c) were not violations of these subsections, and thus they also failed to serve as the object of a section 1962(d) conspiracy.

Lightning Lube is thus distinguishable. In this case, Rehkop's allegations state a violation of section 1962(c). The reason he cannot pursue such a claim is that he was not harmed by the section 1962(c) violation. Nonetheless, the defendants' alleged violation of section 1962(c) can serve as the object of a section 1962(d) conspiracy, and if Rehkop was harmed by reason of the conspiracy, he may pursue a section 1962(d) claim.

Thus, this case is within *Shearin*'s rule that a plaintiff's allegation that he or she was harmed in furtherance of a conspiracy under 1962(d) states a claim for relief under section 1964(c). Although the defendants contend that Rehkop has failed to allege a distinct RICO enterprise; that he has failed to plead his allegations of fraud with sufficient particularity as required by Fed. R. Civ. P. 9(b); and that he has not adequately pled the existence of a conspiracy, we need not reach these issues at this juncture. On remand, the plaintiff will have ample opportunity to amend so as to sharpen his pleadings and refine his theories.

We acknowledge that a majority of courts have disagreed with *Shearin* and have held that only injuries caused by RICO predicate acts provide standing to sue for conspiracy claims. We need not defend *Shearin* here. It is the law of this circuit, and there will be time to explore its correctness if the issue goes en banc. See section 9.1 of our Internal Operating Procedures; *O. Hommel Company v. Ferro Corporation*, 659 F.2d 340, 354 (3d Cir. 1981) ("...a panel of this court cannot overrule a prior panel precedent.").

Although other courts of appeals have taken a different path than we did in *Shearin*, the Supreme Court has not spoken on this issue and Congress has not acted to remedy the division. As a result, we continue to be bound by our Internal Operating Procedures and appropriately must follow our precedent set forth in *Shearin*. Therefore, Rehkop's termination, as with *Shearin*'s hiring and firing, is sufficient to constitute an overt act of an alleged conspiracy and an injury sustained by reason of a violation of section 1962.

IV.

Accordingly, we will reverse the judgment of the district court dismissing the section 1962(d) claim. In addition, we will vacate the judgment of the district court dismissing Rehkop's claims pursuant to the Pennsylvania

Whistleblower Law, Pa. Stat. Ann. tit. 43, §§ 1421 et seq., and wrongful discharge so that they may be reconsidered by the district court. In all other respects, we will affirm the judgment of the district court.

Each side to bear its own costs.